STATE OF MICHIGAN

IN THE SUPREME COURT

In Re Complaint of Enbridge Energy, Limited Partnership against Upper Peninsula Power Company	
UPPER PENINSULA POWER COMPANY	Supreme Court No. 153116
Appellant,	Court of Appeals No. 321946
v	
ENBRIDGE ENERGY, LIMITED PARTNERSHIP	Michigan Public Service Commission Case No. U-17077
Appellee.	

REPLY OF

UPPER PENINSULA POWER COMPANY

IN SUPPORT OF

APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted by,

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INTRODUCTION

Appellant Upper Peninsula Power Company ("UPPCo"), pursuant to MCR 7.305(E) and 7.212(G), files this Reply to Enbridge Energy, Limited Partnership's ("Enbridge") Answer and Brief in Opposition to UPPCo's Application for Leave to Appeal ("Answer"). This Reply supplements and incorporates UPPCo's Application for Leave to Appeal and addresses the more significant substantive misstatements and omissions in Enbridge's Answer. Accordingly, that this Reply does not object or respond to other statements in Enbridge's Answer should not be construed as UPPCo's acceptance of such statements.

REPLY TO COUNTER-STATEMENT OF FACTS AND PROCEEDING

I. The First PSC Docket, Case No. U-15988

The Revenue Decoupling Mechanism ("RDM") at issue in this case was crafted with the agreement of all the parties as part of multi-party, multi-faceted settlement agreement approved by the Michigan Public Service Commission ("Commission") in its December 16, 2009 Order in that case. Contrary to Enbridge's statements (*e.g.*, Answer, p 6), UPPCo customers intervened in that general rate case proceeding and agreed to the settlement. Also, the Settlement Agreement included rate increases, albeit at amounts less than requested in the Application. The RDM provisions in the Settlement Agreement were not for a mere "accounting reconciliation" or "accounting mechanism" (Answer, pp 6, 24), but specifically set forth for immediate implementation the mechanics and details of how the RDM was to operate and be addressed and implemented in future annual reconciliation proceedings. In this regard, the future reconciliation proceedings neither "approved or directed the use of the RDM" (Answer, p 18), but simply: (i) applied the previously approved provisions of the RDM to the quantity of service recorded during the year being reconciled; and (ii) calculated the resulting surcharge or credit. At most

each annual reconciliation would involve only several mathematical exercises and did not involve any issue related to the "approval" of the RDM.

II. The Second PSC Docket, The 2010 RDM Reconciliation, Case No. U-16568

As addressed in UPPCo's Application (p 3), due notice was provided to customers of the 2010 RDM reconciliation proceeding. Enbridge's statement that its separate complaint proceeding, Case No. U-17077, was its "first ... opportunity to litigate and contest" (Answer, pp 23, 25) any issue regarding the RDM is incorrect.[1] Enbridge, like all other customers, had every opportunity to fully participate in, and litigate its positions regarding the RDM in the 2010 RDM reconciliation proceeding by filing a timely petition to intervene as provided in Rule 306 of the Commission's Rules of Practice and Procedure, R 792.10306, and the notice of hearing.[2] Enbridge's failure to take advantage of such opportunity was the result of its own decisions and/or inaction. The Commission's denial of Enbridge's request for rehearing in that proceeding was correct as Enbridge failed to take, on a timely basis, the steps required to become a party to, and participate in, such proceeding.

Both: (i) the Counter-Statement of Facts and Proceedings; and (ii) Law and Argument sections of Enbridge's Answer (*e.g.*, pp 2,17), repeatedly err in describing the Commission's August 2012 Order in the 2010 RDM reconciliation proceeding as "approv[ing]" the RDM or the use of the RDM. As discussed above and in UPPCo's Application, the August 2012 Order in the 2010 RDM reconciliation proceeding did not "approve" (Answer, pp 18, 19, 38) or "renew ... its seal of approval [of]" (Answer, p 15) the RDM but merely implemented the procedures,

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[1] See also Answer, pp 6, 24, "The present proceeding is the first, actual contest between Enbridge and UPPCo."

[2] Enbridge also could have intervened in Case No. U-15988 to challenge the approval of the settlement agreement and RDM, but did not.

calculations and adjustments required by the RDM agreed to by all the parties in the Settlement Agreement approved by the Commission in its 2009 Order in the prior general rate case.

Enbridge's statements (pp 8, 35) that the August 2012 Order approved RDM surcharges "... for an unspecified period" and that it was subject to "RDM charges for over three years" are false. The August 2012 Order, page 5, specified that the RDM charges would be in effect "on a service rendered basis from September 1, 2012, through August 31, 2013". The 2011 RDM reconciliation resulted in refunds/credits, not additional RDM charges. See Application, page 17, fn 22.

REPLY TO LAW AND ARGUMENT

I. The Issue On Appeal Is Not Whether *Re Detroit Edison Co Application*, 296 Mich App 101 (2012) Correctly Decided That 2008 PA 295 Did Not Authorize The Commission To Approve A RDM For Electric Rates, But Whether The Court Of Appeals Erred In Refusing To Apply The Doctrine In *Dodge, supra*, To The Settlement Agreement Approved By The Commission in 2009.

The first two subsections of the Law and Argument section of Enbridge's Answer set forth standards of review and numerous claims and arguments which discuss whether the Court of Appeals' decision in *Re Detroit Edison Co Application*, 296 Mich App 101; 817 NW2d 630 (2012) correctly decided whether MCL 460.1089 and 460.1097(4), as added by 2008 PA 295, authorize the Commission to approve a RDM for electric utilities; but are not applicable nor material to the issue controlling the instant appeal. The issue in this appeal is whether the Court of Appeals erred in refusing to apply the doctrine this Court set forth in *Dodge, supra*, to settlement agreements approved by all the parties to a Commission utility rate proceeding. Enbridge's argument (Answer, pp 9, 18) that *Detroit Edison, supra*, did not "carve out an exception for private party settlement agreements" is irrelevant and misleading as no settlement agreement was involved in *Detroit Edison, supra*. The decision in *Detroit Edison, supra*, is

irrelevant to the application in the instant case of the doctrine this Court recognized and applied in *Dodge v Detroit Trust Co*, 300 Mich 575; 2 NW2d 500 (1942). The only possible relevance is the extent the litigation underlying *Detroit Edison, supra*, demonstrates that there was a genuine dispute in 2009 as to whether 2008 PA 295 authorized or prohibited the Commission's approval of RDMs for electric utilities.

II. Enbridge's Argument That The Court Of Appeals' Decision is Consistent With This Court's Jurisprudence Is Unsupported And Erroneous.

Subsection II.C. (p 30 and footnote 75) of Enbridge's Answer argues that the Court of Appeals' decision "is Consistent with this Court's Jurisprudence", citing the principle that contracts in violation of the law are unenforceable and claiming that there is no exception to that rule for settlement agreements. Enbridge's reliance on such general principle is erroneous as it totally ignores, and is contradicted by, this Court's decision in *Dodge, supra.*

III. Enbridge's Argument That The Facts in *Dodge, supra*, Are Distinguishable Is Unsupported By Any Authority Other Than The Decision Being Appealed And Is Erroneous.

Enbridge's Answer, pp 21-22, claims that the facts in *Dodge, supra*, are distinguishable because: (i) Enbridge was not a party to the prior proceedings; and (ii) the issue of whether the Commission had subject-matter jurisdiction to approve a RDM for electric rates had not been litigated before between Enbridge and UPPCo. These claims do not warrant the Court of Appeals' refusal to apply *Dodge, supra* in the instant case.

Enbridge's Answer does not cite any decisions from Michigan or elsewhere supporting the Court of Appeals' refusal to apply the *Dodge, supra*, doctrine to a utility customer who decides not to participate in the duly-noticed proceeding leading to the settlement agreement at issue. As set forth above and in UPPCo's Application (pp 1-3), UPPCo customers were given due notice of both the 2009 general rate case proceeding and the 2010 RDM reconciliation. That

Enbridge failed to, or decided not to, timely intervene in such matters, is not a valid reason to refuse to apply the provisions of the Settlement Agreement to Enbridge or to permit Enbridge to collaterally attack by separate complaint the final, unappealed orders issued in such prior contested case proceedings.[3] To allow such collateral attacks[4] is contrary to public policy in favor of the orderly administration of utility rate matters as it actually encourages customers not to participate in duly noticed rate proceedings so that they can re-raise the issues just resolved by filing a separate complaint.

Enbridge's attempt (Answer, pp 9-10, 24) to argue that the doctrine in *Dodge, supra*, does not apply to the instant case because *res judicata* only applies to matters of subject matter jurisdiction when there is an actual contest between the parties is inapplicable as the question of the Commission's authority over RDMs for electric utilities is not one of subject matter jurisdiction. *See Enbridge Energy v PSC*, Court of Appeals No. 321946, December 22, 2015, slip opinion, pp 3-4.

Enbridge's arguments (Answer, pp 27-29) to support the Court of Appeals' attempt to distinguish *Dodge, supra*, on the basis that there could not have been any "disputed issue of law"

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[3] In *Dodge, supra*, 610-611, the Supreme Court cited to *Chicot County Drainage District v Baxter State Bank*, 308 US 371, 377, 378, 60 SCt 317, 320, 84 LEd 329, stating:

> And where a holder of drainage district bonds ignored notice of hearing before the Federal District Court in proceedings to readjust the bonded indebtedness of the drainage district, he was concluded by the final decree in such proceedings, although the statute under which the court had acted was subsequently declared unconstitutional in a suit between other parties. The court had not expressly found that the statute was constitutional or that it had jurisdiction; no question as to its jurisdiction had been raised, and it had simply assumed that it had it. The holder's subsequent action on the bonds was held barred by the prior adjudication in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 377, 378, 60 S.Ct. 317, 320, 84 L.Ed. 329:

[4] Contrary to Enbridge's claim (Answer, p 23), Enbridge's complaint is an impermissible "collateral attack" on the unappealed, final Commission orders in the 2010 RMD reconciliation, as the only rates challenged in the complaint are the charges approved in that proceeding. *See generally, Workers Compensation Agency Director v MacDonald's Industrial Products, Inc.*, 305 Mich App 460, 476-480; 853 NW2d 460 (2014), lv den 497 Mich 888 (2014).

in 2009 as to the Commission's authority to approve RDMs for electric utilities do not add anything to support the Court of Appeal's decision and are without merit. As discussed above, despite Enbridge's continued rhetoric (*e.g.*, Answer, p 27), the time for determining whether a 'disputed issue of law' existed was when the settlement agreement was entered into (*i.e.*, 2009), not the time (*e.g.*, 2012) when subsequent proceedings were conducted regarding the implementation of the previously approved settlement agreement. *See generally, Dodge, supra,* 614-615.[5]

Enbridge's claim (Answer, p 28) that UPPCo's and the Commission's claims that the Court of Appeals erred in finding that reasonable minds could not have differed in 2009 as to the extent of the Commission's authority to approve RDMs for electric utilities was based upon "subjective beliefs of litigants and their counsel" is erroneous. UPPCo's (Application, pp 11-12) and the Commission's claims are based upon and fully supported by rulings and positions clearly set forth in filed and publicly available documents. Enbridge's continued argument (Answer, pp 13, 28-29) that "reasonable minds reviewing the statute could not have differed" merely repeats without additional persuasiveness the Court of Appeals' erroneous conclusion and is belied by the Court's repeated recognition of the Commission's broad ratemaking power under various statutes to set just and reasonable rates, including the establishment and implementation of adjustment clauses. (*See generally*, Application, p 10)

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[5] In *Dodge, supra*, 614-615, the Supreme Court stated:

> The rule is the same in England (Callischer v. Bischoffsheim, 5 Q.B. 449), and is stated as follows by Bowen, L. J., in Miles v. New Zealand Alford Estate Co., 32 Ch. 266, 291: '* * * **the reality of the claim which is given up (i. e., compromised) must be measured,** not by the state of the law as it is ultimately discovered to be, but **by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious that you could never safely compromise a question of law at all.' (emphasis in bold** added)

Enbridge's effort to distinguish *Dodge, supra*, by claiming (*e.g.*, Answer, pp 3, 13, 27) that "the Court of Appeals recognized that here there was no intervening change in the plain language of the statute" is erroneous and without merit. The Court of Appeals' discussion (slip opinion, p 4) of *Dodge, supra*, below did not refer specifically to a change in "statutory language" but an "intervening change in the law". In fact, there is no evidence that the statutory provision (3 Comp Laws 1929, §12934; Mich Stat Ann §26.14)[6], upon which plaintiff relied in *Dodge, supra*, was amended between the date the settlement agreement was approved by the Circuit Court on November 29, 1921 and the date the bill of complaint was filed on May 20, 1939. *See Dodge, supra*, 591, 593[7]. Rather, the intervening event (or clarification) was the issuance of *In Re Richard's Estate*, 283 Mich 486; 278 NW 657 (1938)[8], which held that when a trust governing both personal and real property violated the restrictions in 3 Comp Laws 1929, §12934 applicable to real estate, the entire trust might be declared invalid. The issuance of the *Re Richard's Estate, supra*, decision resolved a potential legal issue in *Dodge, supra*, just like the decision in *Detroit Edison, supra,* did in the instant case.

IV. Enbridge's Claim That The Commission Sought To Avoid Decisions Of The Court Of Appeals And The Legislature Are False And Unjustified.

Enbridge's claim (Answer, pp 2, 17, 30) that after the decision in *Detroit Edison, supra*, "the PSC then sought to avoid the Court of Appeals' decision and the intent of the Legislature" is unwarranted, unsupported and ignores *Dodge, supra*. As discussed above, the settlement agreement creating the RDM was signed and approved in 2009, long before *Detroit Edison, supra*, and not afterwards.

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[6] Repealed by 1949 PA 38. See Historical and Statutory Notes to MCL 544.14 to 554.20.

[7] The other statute discussed in *Dodge, supra*, 589,591, 1921 Public Act 249, went into effect on August 18, 1921, before the circuit court entered its decree approving the settlement agreement.

[8] *See Dodge, supra*, 598.

Enbridge's argument (Answer, pp 30-31) that recognition that *Dodge, supra*, applies in this case, means that "the PSC would be duty-bound to approve a settlement agreement even though the Legislature had expressly stated that such a result would be illegal" is ridiculous. The Commission has the authority to accept or reject settlement agreements.

Enbridge's claim (Answer, pp 17, 31) that the rates "approved in the August 2012 Order are by definition unlawful, unjust, and unreasonable" and should be refunded is unsupported. Even *assuming arguendo*, that the RDM was not permitted, Enbridge has not presented any evidence showing that the overall rates approved for service provided in 2010 were unjust or unreasonable and should be refunded.[9]

Enbridge's arguments (Answer, p 31) that applying *Dodge, supra*, would give regulatory agencies a "blank check" to expand their authority via settlement agreements, "violate core principles of statutory interpretation" and "allow a limited number of unelected, private parties to effectively change Michigan law" are unsupported and erroneous. *Dodge, supra*, does not give the Commission a blank check, but only applies when a disputed issue of law exists and all parties to the proceedings enter into a settlement agreement. *Dodge, supra* merely permits the parties and Commission to resolve a possibly disputed issue of law by settlement agreement.

V. Enbridge's Claims That Refusing To Apply *Dodge, supra*, To Commission Proceedings Will Not Adversely Affect Settlement Is Erroneous.

Enbridge (Answer, pp 34-36) enumerates four reasons why it claims this Court should deny leave to appeal. All are without merit. In the first two arguments (Answer, p 34), Enbridge characterizes the Court of Appeals' ruling as: (i) limited to the application of a single, specific statutory provision; and (ii) a refusal to extend (rather than a limitation on) the application of

[9] *See generally, General Telephone Co of Michigan v PSC*, 341 Mich 620, 631; 67 NW2d 882 (1954); *Building Owners and Managers Ass'n of Metropolitan Detroit v PSC*, 131 Mich App 504; 346 NW2d 581 (1984) lv den 424 Mich 494 (1986).

Dodge, supra. These claims are without merit and do not diminish the adverse impact of the Court of Appeals' decisions on settlements in Commission utility rate proceedings. Rather the reasoning used and result reached by the Court of Appeals (as well as the arguments advanced by Enbridge) strongly indicate that customers who do not participate in utility rate proceedings before the Commission and/or are not parties to settlement agreements in such proceedings are free to attack (even possibly retroactively attack) previously approved rates by filing a separate complaint before the Commission. The resulting uncertainty and lack of finality regarding amounts to be collected for service previously provided at rates agreed to by all the parties in a duly noticed contested case and approved by the Commission is detrimental to utilities, customers and the public interest.

Enbridge acknowledges that the Court of Appeals' refusal to apply *Dodge, supra,* has the effect of forcing parties to settlements to "a more conservative approach" (Answer, p 35) in structuring a settlement. Thus, the Court's decision threatens to remove from the "menu" of possible settlement terms or approaches, any action or rate which might one day be argued or ruled to be beyond the Commission's authority. As this Court stated in *Dodge, supra*, 614-615, such limitations on possible settlement means that "with regard to questions of law it is obvious that you could never safely compromise a question of law at all." Such a result can have only significantly adverse impacts on the public interest.

The third reason stated by Enbridge (Answer, p 35) for denying the application is without merit. Although this appeal does involve a state agency (*i.e.*, the Commission), that alone is not the basis for the application for leave to appeal. See MCR 7.305(B)(2). This appeal also involves issues of significant public interest; and granting this application does not mean that this Court is "expected to hear every appeal involving the PSC." (Answer, p 35).

The fourth reason stated in Enbridge's Answer, (pp 15, 36) is that leave should be denied because the Court of Appeals decision is correct. For the reasons set forth in the Application and above, this claim is erroneous and must be rejected.

REQUESTED RELIEF

For the reasons set forth above and in UPPCo's Application for Leave to Appeal, Appellant UPPCo respectfully requests that this Honorable Court grant leave to appeal, review and reverse the Court of Appeals' decision in Docket No. 321946 and uphold the Commission's dismissal of Enbridge's Complaint with prejudice in Case No. U-17077.

Respectfully submitted,

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Dated: March 22, 2016

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Supreme Court No. 153116

Appellant,

Court of Appeals No. 321946

V

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

MPSC Case No. U-17077

Appellee.

PROOF OF SERVICE

Theresa M. Briseno, being first duly sworn, deposes and says that on March 22, 2016 she served a copy of Appellant's Upper Peninsula Power Company ***Reply of Upper Peninsula Power Company in Support of Application for Leave to Appeal*** upon the following individuals shown on the attached service list by placing same in envelopes addressed to said individuals and mailing same by U.S. Mail and electronic mail as indicated below.

Theresa M. Briseno

Theresa M. Briseno

Subscribed and sworn before me
on this 22nd day of March, 2016.

Crystal L. Abbott

Crystal L. Abbott, Notary Public
State of Michigan, County of Eaton
My Commission Expires: May 25, 2018
Acting in Ingham County

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March 22, 2016

VIA HAND DELIVERY

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Re: Upper Peninsula Power Company v Enbridge Energy, Limited Partnership
Supreme Court Case No. 153116
Court of Appeals No. 321946
Michigan Public Service Commission Case No. U-17077

Dear Clerk:

Enclosed please find for filing the Reply of Upper Peninsula Power Company in Support of Application for Leave to Appeal (1 original and 3 copies) and Proof of Service.

At your earliest convenience, please provide a time-stamped copy of the filing. Thank you for your assistance in this matter.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By: Ronald W. Bloomberg
Ronald W. Bloomberg

Enclosures

cc: Stephen R. Serraino
Susan Devon

SAW/tmb
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